84-1589

No. .....

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In The

Supreme Court of the United States

October Term, 1984

IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS BEFORE THE DISCIPLINARY BOARD OF THE WASHINGTON STATE BAR ASSOCIATION,

AGAINST

RICHARD B. BARNEY, JR., An Attorney at Law,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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QUESTIONS PRESENTED

1. Whether the Washington State Bar Association disciplinary proceedings afforded Mr. Barney an opportunity to adjudicate the constitutional claims.

2. Whether Mr. Barney should have been granted the right to *voir dire* the members of the Disciplinary Board of the Washington State Bar Association under the appearance of fairness doctrine.

3. Whether the Rule for Lawyer Discipline 1.1(h), as interpreted and applied by the Washington State Bar Association, and Formal Opinion 171, are illogical, irrational and unintelligible.

4. Whether Rule for Lawyer Discipline 1.1(h), as applied and interpreted by the Washington State Bar Association, and Formal Opinion 171, violate Freedom of Association under the First Amendment and Due Process and Equal Protection under the Fourteenth Amendment of the United States Constitution and under Article 1, Sections 3 and 12 of the Washington State Constitution.

5. Whether the relief to be granted in this case is remanding the matter back to the Washington State Supreme Court and the Disciplinary Board of the Washington State Bar Association with instructions to permit a meaningful opportunity to adjudicate the constitutional claims raised by Mr. Barney.

TABLE OF CONTENTS

Pages

Questions Presented i

Petition 1

Opinions Below 2

Jurisdiction 2

How the Federal Question was Raised and Passed Upon 2

Constitutional Provisions, Rules of Lawyer Discipline and Opinion Involved in the Case 4

Statement of the Case 7

Reasons for Granting the Petition 10

I. The State Bar Disciplinary Proceedings did not Provide an Opportunity to Adjudicate Constitutional Claims 10

A. The Disciplinary Board should have granted Mr. Barney the right to *voir dire* the panel under the appearance of fairness doctrine 11

B. Rule of Lawyer Discipline 1.1(h), as interpreted and applied by the Bar Association, and Formal Opinion 171, are illogical, irrational and unintelligible 12

II. Rule of Lawyer Discipline 1.1(h), as interpreted and applied by the Bar Association, and Formal Opinion 171, violate Freedom of Association under the First Amendment and Due Process and Equal Protection under the Fourteenth Amendment of the United States Constitution and under Article 1, Sections 3 and 12 of the Washington State Constitution 14

Conclusion 18

Appendix 20

TABLE OF AUTHORITIES

CASES: Pages

Avery v. Midland County, 390 U.S. 474, 20 L.Ed.2d 48, 88 S. Ct. 390 (1965) 15

Baggett v. Bullitt, 376 U.S. 360, 12 L. Ed. 2d 377, 84 S. Ct. 316 (1964) 16

Beard v. State Bar of Arizona, 401 U.S. 1, 27 L. Ed. 629, 91 S. Ct. 702 (1971) 15

Board of Regents v. Roth, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972) 16

Chicago, Milwaukee and St. Paul Pacific Railroad v. State Human Rights Commission, 87 Wn.2d 802, 557 P.2d 307 (1976) 11

Cramp v. Board of Public Instruction, 368 U.S. 278, 7 L. Ed. 2d 285, 82 S. Ct. 275 (1961) 16

Ferris v. Snively, 172 Wash. 167, 19 P.2d 942 8

Florida Bar v. Thompson, 310 S. 2d 300 (Fl. 1975) 12

In Re Application of McKelvey, 255 Pac. 834 (Cal. 1927) 12

In re Belsher, 102 Wn.2d 844, 689 P.2d 1078 (1984) 10

In Re Chantry, 84 Wn. 2d 153, 524 P.2d 909 (1974) 12, 16, 17

In Re Egger, 93 Wn.2d 706, 611 P.2d 1260 (1980) 12, 16, 17

In re Little, 40 Wn.2d 432, 244 P.2d 255 (1952) 10

In re Ming, 469 F.2d 1352 (7th Cir. 1972) 10

In Re Rosenbluth, 36 App. Div. 2d 383, 320 NYS 2d 839 (1971) 12

In re Stroh, 97 Wn.2d 289, 644 P.2d 289 (1982) 10

Middlesex Ethics Comm. v. Gordon State Bar Assn., 457 U.S. 423, 73 L.Ed.2d 116, 102 S.Ct. 2515 (1982) 18

TABLE OF AUTHORITIES—Continued

Pages

Moose Lodge 107 v. Irvis, 407 U.S. 163, 32 L.Ed.2d 627, 92 S. Ct. 1967 (1972) 15

Myrick v. Pierce County Commissioners, 102 Wn.2d 698, 687 P2d 1152 (1984) 14

Perry v. Sindermann, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2974 (1972) 16

Peterson v. State, 100 Wn.2d 421, 671 P2d 230 (1983) 15

Schware v. Board of Bar Examiners, 253 U.S. 232, 1 L. Ed. 796, 77 S. Ct. 752 (1957) 15

State v. Phelan, 100 Wn.2d 508, 671 P2d 1212 (1983) 15

Stockwell v. Washington State Chiropractic Disciplinary Board, 28 Wn. App. 295, 622 P.2d 910 (1981) 11

OTHER AUTHORITIES:

28 U.S.C. 1257(3) 2

7 Am. Jur. 2d *Attorney at Law*, § 33 12

16 Am. Jur. 2d *Constitutional Law*, Section 18 16

Amendment XIV, Section 1 U. S. Constitution 4, 14

Article 1, Section 3, Washington Constitution 4, 14

Article 1, Section 12, Washington Constitution 4, 14

DR 7-110, CJC 3A (4) 5, 11

Formal Opinion 171 ..... 6, 13, 14

RLD 1.1(h) 4, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18

RLD 6.7(e) 3, 5, 9

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IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS BEFORE THE DISCIPLINARY BOARD OF THE WASHINGTON STATE BAR ASSOCIATION,

AGAINST

RICHARD B. BARNEY, JR., An Attorney at Law,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Richard M. Barney, Jr., an attorney at law, licensed to practice law in the State of Washington, petitions for a writ of certiorari to review the order of the Supreme Court of the State of Washington, denying his Petition for Review, and to review and vacate the order of the Disciplinary Board of the Washington State Bar Association, modifying the Hearing Officer's Decision.

OPINIONS BELOW

The order of the Washington State Supreme Court denying the attorney's Petition for Review (App. A, *infra*, p. 1) is not reported. The orders of the Disciplinary Board of the Washington State Bar Association modifying and adopting the Hearing Officer's Decision (App. B, *infra*, pp. 2-3) and denying the attorney's Petition for Clarification and Petition for Reconsideration (App. C, *infra*, p. 4) are not reported. The decision of the Hearing Officer (App. D, *infra*, pp. 5-18) is not reported.

JURISDICTION

The order of the Washington State Supreme Court denying the attorney's Petition for Review of the order of the Disciplinary Board of the Washington State Bar Association modifying the Hearing Officer's decision was entered on January 4, 1985. There is no provision for a motion for reconsideration of this type of order. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

HOW THE FEDERAL QUESTION WAS RAISED AND PASSED UPON

The attorney raised the Federal questions here presented before the Hearing Officer in the attorney's trial memorandum of authorities and in pretrial motions. The Hearing Officer concluded that he did not have authority

to decide the constitutional questions that had been raised (App. D, *infra*, p. 5).

The attorney next raised the Federal questions here presented before the Disciplinary Board of the Washington State Bar Association, in its review of the Hearing Officer's decision, in the attorney's appellate brief and in argument to the Disciplinary Board. The order of the Disciplinary Board does not state whether it considered the constitutional questions that had been raised (App. B, *infra*, p. 2). The attorney filed a Petition for Clarification and a Petition for Reconsideration of the order, requesting the Disciplinary Board to state whether it considered the constitutional challenges, and if it had, to render a decision disposing of the issues, as required by RLD 6.7(e). The Chairman of the Disciplinary Board denied the petitions (App. C, *infra*, p. 4). It is not known why the Disciplinary Board overruled the decision of the Hearing Officer, and whether it considered the constitutional challenges, because of its failure to give reasons for its decision, as required by RLD 6.7(e), and because it refuses to disclose whether it considered the constitutional challenges.

The attorney next raised the Federal questions here presented in his Petition for Review filed with the Supreme Court of the State of Washington to review the orders of the Disciplinary Board. The petition was denied, thereby refusing to consider the constitution challenges.

CONSTITUTIONAL PROVISIONS, RULES OF LAWYER DISCIPLINE AND OPINION INVOLVED IN THE CASE

Amendment XIV Section 1 of the United States Constitution.

> § 1. Citizenship rights not to be abridged by states Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 1, Section 3 of the Washington Constitution.

> § 3. Personal Rights. No person shall be deprived of life, liberty, or property, without due process of law.

Article 1, Section 12 of Washington Constitution.

> § 12. Special Privileges and Immunities Prohibited. No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Rules for Lawyer Discipline (Washington).

> RULE 1.1 GROUNDS FOR DISCIPLINE
>
> A lawyer may be subjected to the disciplinary sanctions or actions set forth in these rules for any of the following:
>
> . . . . . .
>
> (h) Practicing law with or in cooperation with a disbarred or suspended lawyer, or maintaining an office for the practice of law in a room or office occupied or used in whole or in part by a disbarred or suspended lawyer, or permitting a disbarred or sus-

pended lawyer to use his or her name for the practice of law, or practicing law for or on behalf of a disbarred or suspended lawyer, or practicing law under any arrangement or understanding for division of fees or compensation of any kind with a disbarred or suspended lawyer;

RULE 6.7 DECISION OF BOARD

(e) Decision. The action of the Board shall be set forth in a written order filed with the Association, a copy of which shall be served upon the respondent lawyer. If the Board amends, modifies, or reverses any finding, conclusion or recommendation of the hearing officer or panel, the order of the Board shall set forth the reasons for its decision.

Code of Professional Responsibility.

DR 7-110 CONTACT WITH OFFICIALS

• • •

(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) As required in the course of official proceedings in the cause.

(2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.

(3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(4) As otherwise authorized by law.

Code of Judicial Conduct.

CANON 3. A JUDGE SHOULD PERFORM THE DUTIES OF HIS OFFICE IMPARTIALLY AND DILIGENTLY.

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply.

(A) Adjudicative Responsibilities.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a distinterested expert on the law applicable to a proceeding before him, by amicus curiae only, if he affords the parties reasonable opportunity to respond.

FORMAL OPINION 171

AN ATTORNEY IN GOOD STANDING MAY NOT HIRE A DISBARRED ATTORNEY IN ANY CAPACITY

An opinion has been requested regarding the relationship between a disbarred attorney and attorneys authorized to practice law. The Code of Professional Responsibility does not specifically address this issue. The Code does prohibit a lawyer from aiding a nonlawyer in the unauthorized practice of law. DR 3-101(A). It further prohibits a lawyer from sharing legal fees with a nonlawyer if any of the activities of the partnership consist of the practice of law. DR 3-103.

The Discipline Rules for Attorneys do address the issue and provides as follows at DRA 1.1(h):

> An attorney at law may be subjected to the disciplinary sanctions or actions set forth in rule 1.2 for any of the following causes, hereinafter sometimes referred to as violations of the rules of professional conduct:
>
> . . .

> (h) . . . (P)racticing law under any arrangement or understanding for division of fees or compensation of any kind with a disbarred . . . attorney. . . .

This rule addressed how an attorney in good standing must act. Therefore, DRA 1.1(h) clearly prohibits an attorney in good standing from practicing law under any arrangement or understanding for division of fees or compensation of any kind with a disbarred attorney.

This clear prohibition against attorneys practicing law while compensating a disbarred attorney means that an attorney in good standing who hires a disbarred attorney in any capacity could be subject to discipline for a violation of the Discipline Rules for Attorneys. Therefore, attorneys should refrain from such conduct.

———o———

STATEMENT OF THE CASE

The Hearing Officer's Findings of Fact (App. D, *infra,* p. 6), being from stipulated facts and being uncontested, must be accepted as true. We proceed on that basis.

In the fall of 1983 Mr. Barney found his friend and former partner, Robert Butler, a disbarred attorney, destitue and unable to support his minor children and himself. At the time, Mr. Barney was preparing a case involving complex accounting questions, and Mr. Butler had credible qualifications as an accountant. After thorough research, Mr. Barney concluded that it was not a violation of RLD 1.1(h) (or any other rule) to hire a disbarred attorney to perform non-practice of law work. Thus, he hired Mr. Butler to perform accounting work and some research,

(which under *Ferris v. Snively,* 172 Wash 167, 19 P2d 942 (1933) did not constitute the practice of law). (App. 61-65).

Mr. Barney also determined to bring suit for Mr. Butler to clarify once and for all if RLD 1.1(h) carried any restrictions regarding the hiring of a disbarred attorney for non-practice of law work. Before he could do so, he was notified by the Washington State Bar Association, in December, 1983, that his conduct violated RLD 1.1(h). Mr. Barney terminated Mr. Butler and so notified the Bar Association (App. 23-29). Six months later, charges were filed (App. 33). The Bar Association refused to reveal the name of the informer against Mr. Barney, but it was subsequently determined by Mr. Barney and his counsel that the informer was probably a disgruntled employee released at or about the time of the initial Bar Association letter and she had made numerous unfounded allegations against him to the Bar Association (App. 89-90).

Mr. Robert Carter, Hearing Officer, heard the matter in August, 1984. Upon the Bar Association's motion, Mr. Carter refused to consider the constitutional questions (App. 59). He also refused to consider evidence of disbarred or suspended attorneys working for practicing attorneys, although known to the Bar Association and/or the Courts, and, in particular, a recent incident of the Bar Association recommending admission of a suspended out of state attorney partly by reason of his employment with a King County attorney (App. 59-60). However, Mr. Carter concurred with Mr. Barney's interpretation of RLD 1.1(h) in his August 10, 1984 determination (App. 69-71).

The Bar Association appealed. The matter was argued before the Board on November 2, 1984. Because of concern for what had been conveyed by the former disgruntled employee and lack of knowledge of information given to the Board in this respect, respondent's counsel moved to strike the three members who had originally considered the charges against Mr. Barney and to *voir dire* the balance of the Board (App. 88, 89). Only one member of the original three member panel (a Mr. Ferguson) was still on the Board, and he voluntarily withdrew. The motion to *voir dire* was treated as being out of place and was denied. Based upon what occurred at the hearing, we believe we can advise the Court that the Board did not consider constitutional questions.

The Disciplinary Board entered an Order (App. 93, 94) determining that Mr. Barney's conduct violated RLD 1.1(h). The Board also concluded Mr. Barney acted in complete good faith, and no sanctions were imposed. The Order, signed by the Chairman on November 8, 1984, was mailed to respondent's attorney on November 12, 1984, and received on November 13, 1984. The method of its entry and form gave rise to other documents. The Board directly conveyed its determination to Bar Counsel who then prepared the Order and had it signed and entered before it was seen by respondent's attorney (App. 95, 96). That Order does not give "reasons" as required by RLD 6.7(e), and, most important, it does not state whether the Board considered constitutional questions, the argument having been made by Bar Counsel that the Hearing Officer and Board, as administrative agencies, must leave such issues to the courts (App. 59).

REASONS FOR GRANTING THE PETITION AND MOTION

I. The State Bar Disciplinary Proceedings Did Not Provide An Opportunity To Adjudicate Constitutional Claims.

The practice of law in the State of Washington is a privilege, not a right. *In re Little,* 40 Wn.2d 432, 244 P.2d 255 (1952); *In re Belsher,* 102 Wn.2d 844, 689 P.2d 1078 (1984). The Washington State Supreme Court does acknowledge that discipline proceedings regarding the privilege to practice law must comport with due process. *In re Stroh,* 97 Wn.2d 289, 644 P.2d 289 (1982), in the dissenting opinion at page 303, quoting from *In re Ming,* 469 F.2d 1352 (7th Cir. 1972), at page 1355:

> Both licenses to practice law and welfare payments can be viewed as a type of "new property," Reich, The New Property, 73 Yale L.J. 733 (1964), the deprivation of which has drastic consequences to the individual. It is only fair and just that the Government not subject any person to such a drastic divestment without affording him substantial due process of law. . . .

Nowhere in the disciplinary proceedings was Mr. Barney provided the opportunity to adjudicate constitutional claims.

There were two occurrences in the disciplinary proceedings before the Disciplinary Board that establish Mr. Barney was not afforded substantial due process of law. They involve decisions which are in conflict with the Court's rules.

A. The Disciplinary Board Should Have Granted Mr. Barney The Right To Voir Dire The Panel Under The Appearance Of Fairness Doctrine.

The appearance of fairness doctrine has been broadly adopted in Washington State. *Stockwell v. Washington State Chiropractic Disciplinary Board,* 28 Wn. App. 295, 622 P.2d 910 (1981); *Chicago, Milwaukee and St. Paul Pacific Railroad v. State Human Rights Commission,* 87 Wn.2d 802, 557 P.2d 307 (1976). A person appearing before any agency has the right to assume an unbiased panel and any reasonable concern of bias will be brought into the open and examined. Manifestly, a concern will exist when one counsel gives advice to the panel and the members rely upon his or her expertness.

The prohibition against communication to only one counsel, whether a judge or administrative official be involved, is patent. See DR 7-110, CJC 3A (4). This concept was disregarded in preparation and entry of the Order by the Disciplinary Board in the present case.

The net effect is that Mr. Barney's counsel was denied the opportunity to determine the Board member's proclivity for accepting Bar Counsel's position. In the end, the Board relied upon Bar Counsel to draft an Order giving its reasons for its determination without any notification to, much less participation by, Mr. Barney's counsel. The end product is an Order which does not give the Board's reasons—except they all interpreted RLD 1.1 (h) in the same manner. (Query: Was that unified conclusion in any way influenced by reliance on Bar Counsel?) The same Order left unclear whether the

Board considered the constitutional questions. Perhaps worst of all, the absence of the Board's reasoning leaves Mr. Barney without means of ascertaining if he can rely upon the Board's precise wording in determining whether to continue employing Mr. Butler.

Any other profession would have a right to have the procedural issues determined by a court. An attorney should not be entitled to anything less.

B. Rule For Lawyer Discipline 1.1(h), As Interpreted And Applied By The Bar Association, And Formal Opinion 171 Are Illogical, Irrational And Unintelligible.

Not only is the Disciplinary Board's interpretation of RLD 1.1 (h) inconsistent with the Washington State Supreme Court's decision, but it is against the general law in the United States. A disbarred attorney has the same status as a person never admitted to practice law. 7 Am. Jur. 2d *Attorney at Law,* § 33, *In Re Application of McKelvey,* 255 Pac. 834 (Cal. 1927). *Florida Bar v. Thompson,* 310 S. 2d 300 (Fl. 1975). *In Re Rosenbluth,* 36 App. Div. 2d 383, 320 NYS 2d 839 (1971). We have not been able to find, and the Bar Association has not cited, an appellate case to the contrary.

In at least two prior Washington State cases, *In Re Chantry,* 84 Wn. 2d 153, 524 P.2d 909 (1974) and *In Re Egger,* 93 Wn.2d 706, 611 P.2d 1260 (1980), this court found that a disbarred attorney's work with and under the supervision of practicing attorneys demonstrated rehabilitation. In the latter case, the court had before it fifty letters from practicing attorneys praising Mr. Eg-

ger, and most related to the high quality of the research, investigation and other similar work performed by Mr. Egger for them during the term of his disbarment, 93 Wn.2d 708. Those same letters were considered by the Hearing Officer in the present case (App. D, *infra*, p. 5).

The only contrary authority is Formal Opinion 171 which concludes that the employing of a disbarred attorney in any capacity by a practicing attorney "could be" a violation of RLD 1.1 (h). Even if one concedes Formal Opinion 171 prohibited the hiring of a disbarred attorney, it is not a binding opinion (App. 68). Mr. Barney was able to uncover the Bar Association's file pertaining to Opinion 171. The concern giving rise to Opinion 171 was the hiring of disbarred attorneys in the "capacity" of office managers, legal assistants and the like so as to permit them to practice law (App. 1). It was a stipulated fact that Mr. Butler was not in any way engaging in the practice of law (App. 64).

There is another reason for this court to now give consideration to RLD 1.1 (h) and the entire question of disbarred attorneys. The rule in one form or another has been in effect since 1922. No one can deny it is ambiguous. The need for Formal Opinion 171 establishes that.

We submit the following is an accurate description of the logic inherent in Formal Opinion 171 and any determination that RLD 1.1(h) prohibits any employment of a disbarred attorney by a practicing attorney.

> "*RLD 1.1(h)* 'early *prohibits* an *attorney* in good standing *from practicing law under any arrangement or understanding for division of fees or compensation* of any *kind with a disbarred attorney.*

= equals =

"This clear *prohibition against attorneys practicing law while compensating a disbarred attorney means an attorney* in good standing *who hires a disbarred attorney in any capacity* could be *subject to discipline* for a violation of the Rules for Lawyer Discipline.

= equals =

"An *attorney* in good standing *may not hire a disbarred attorney in any capacity.*"

Perhaps the last time this example of logic was employed was by Humpty Dumpty in Alice in Wonderland when he stated that the meaning of a word was whatever he wanted it to mean.

II. RLD 1.1(h), As Interpreted And Applied By The Bar Association, And Formal Opinion 171, Violate Freedom Of Association Under The First Amendment And Due Process And Equal Protection Under The Fourteenth Amendment Of The United States Constitution And Under Article 1, Sections 3 And 12 Of The Washington State Constitution.

The first clearly recognizable constitutional violation, under the Bar Association's construction, falls within the right of association under the First Amendment of the Federal Constitution. The Washington State Supreme Court recently reaffirmed that the right of association applies to business activities. *Myrick v. Pierce County Commissioners*, 102 Wn.2d 698, 687 P2d 1152 (1984). The state may not use a person's associations to prohibit him from practicing law unless it meets the heavy burden of showing a necessity of protecting a legitimate state in-

terest. *Beard v. State Bar of Arizona,* 401 U.S. 1, 27 L. Ed. 629, 91 S. Ct. 702 (1971). *Schware v. Board of Bar Examiners,* 253 U.S. 232, 1 L. Ed. 796, 77 S. Ct. 752 (1957). Preventing the unauthorized practice of law by disbarred attorneys is unquestionably a legitimate interest. But what is the State interest in preventing disbarred attorneys from earning a livelihood by performing non-practice of law work for practicing attorneys? What would be the constitutional justification in such case when it appears that Washington would be the only State where the hiring of a disbarred attorney to perform research and other similar work is unethical?

The Bar Association's version of RLD 1.1(h) also denies Mr. Barney equal protection under both the Federal and State Constitutions. Those who are similarly situated must be similarly treated. *Peterson v. State,* 100 Wn2d 421, 671 P2d 230 (1983). *State v. Phelan,* 100 Wn2d 508, 671 P2d 1212 (1983). The latter case recognized the "intermediate scrutiny test". Considering the potential serious consequences flowing to any attorney which violates the canons of ethics, we suggest this case is governed by that test. However, even if the "rational relationship test" is applicable, the respondent should still prevail.

Equal protection applies to all levels of state power, including administrative and regulatory agencies. *Avery v. Midland County,* 390 U.S. 474, 20 L.Ed.2d 48, 88 S. Ct. 390 (1965); *Moose Lodge 107 v. Irvis,* 407 U.S. 163, 32 L.Ed.2d 627, 92 S. Ct. 1967 (1972).

Not only has Mr. Barney been the one attorney against whom the Bar Association has sought to enforce RLD 1.1 (h) in over sixty years but his conduct cannot be dis-

tinguished between the almost fifty judges and attorneys who hired Mr. Egger during his disbarment. We are not, as the Bar Association has sought to argue, merely addressing a *lack of total enforcement.* We are addressing an *absence of enforcement.* Excepting this one case, a disbarred attorney's employment with a practicing attorney has demonstrated rehabilitation.

The Bar Association's interpretation also violates Mr. Barney's due process rights. A statute (rule) violates due process when the language does not convey sufficiently definite warning as to the prohibited conduct when measured by common understanding and practices. *Baggett v. Bullitt,* 376 U.S. 360, 12 L. Ed. 2d 377, 84 S. Ct. 316 (1964) 16 Am. Jur. 2d *Constitutional Law,* Section 18. Even closer scrutiny occurs when the statute inhibits the exercise of guaranteed individual freedoms (in this case, the right of association). *Cramp v. Board of Public Instruction,* 368 U.S. 278, 7 L. Ed. 2d 285, 82 S. Ct. 275 (1961). That Mr. Barney, after substantial research, and the hearing officer can come to one conclusion and the Board can arrive at another manifests competent attorneys in good faith can have a different interpretation of RLD 1.1 (h). To declare an ethical violation because of misinterpretation, particularly in view of this court's decisions in *Chantry* and *Egger,* is patently a violation of due process.

Not the least of the constitutional considerations are the due process rights denied Mr. Butler. A state may not deprive a person of an employment contract without due process. *Board of Regents v. Roth,* 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). *Perry v. Sindermann,* 408 U.S. 593, 33 L. Ed 2d 570, 92 S. Ct. 2974 (1972). Note: in *Board of Regents v. Roth,* the court held that Mr. Roth

was not entitled to a hearing because the State had taken no action to prevent him from securing state employment in his particular field. The Bar Association's interpretation of RLD 1.1 (h) has effectively prevented Mr. Butler from not only using his ability at legal research but also his accounting education to obtain work from those persons who would be most likely to hire him. Although a hearing was afforded in the loss of his license as a lawyer, he has not been given a hearing regarding his employment with lawyers for the non-practice of law work.

Egger and *Chantry* again have significance. Both Mr. Chantry and Mr. Egger engaged in employment which would have their employer or supervisor before the Disciplinary Board under the standards applied in this case. The work they performed became a vital factor in demonstrating their rehabilitation. There being no authority to the contrary, Mr. Butler had every right to expect the same treatment. He has not been given the slightest opportunity of showing his situation could be exactly the same as Mr. Chantry and/or Mr. Egger. Concededly, the Bar Association's actions have been against the employing attorney; but it like any other governmental body, is bound by the rule that it cannot indirectly do what is directly prohibited.

Each of the foregrounds for attacking the constitutionality of the Board's construction of RLD 1.1 (h) have been limited by the space available in a petition for review. Included in the Appendix is a more extensive discussion contained in the brief filed before the Hearing Officer (App. 44-53) and before the Disciplinary Board. A new constitutional issue is now raised, i.e. the Hearing Officer and the Board refused to consider the constitu-

tional issues on the theory that the same was in the sole province of the court; now that the Washington State Supreme Court, in its discretion, denied review, the unconstitutionality of RLD 1.1 (h) will never be considered. For this to occur would be not only extremely unfair but in and of itself a denial of due process rights under both Federal and State Constitutions.

CONCLUSION

The Order of the Disciplinary Board of the Washington State Bar Association modifying the Hearing Officer's decision should be vacated because of the failure to adhere to the appearance of fairness doctrine and because of the conduct of the Chairman and Bar Counsel in the preparation of the order.

The petition for a writ of certiorari should be granted as to the Order of the Supreme Court of the State of Washington and as to the Order of the Disciplinary Board of the Washington State Bar Association to permit a hearing on the constitutional issues raised by Mr. Barney. The state bar disciplinary proceedings did not permit an opportunity to adjudicate the constitutional claims.

The case of *Middlesex Ethics Comm. v. Gordon State Bar Assn.*, 457 U.S. 423, 73 L.Ed.2d 116, 102 S.Ct. 2515 (1982), lends itself to the proposition that if the Washington State Supreme Court and the Disciplinary Board of the Washington State Bar Association will now state that they will permit a meaningful opportunity to adjudicate the constitutional claims raised by Mr. Barney, this Court will remand this matter back to the State Court

and the Bar Association for such adjudication. This disposition would be consistent with the relief sought by Mr. Barney in this petition. He requests that the constitutional issues that he raised be decided.

At this point, we feel compelled to explain why review is sought. There being no punishment, why should Mr. Barney be entitled to review? There are sanctions! If he ever seeks office in the Bar Association or the judiciary, the stigma of having violated the canons of ethics could prove an almost insurmountable obstacle. Most important, although the Hearing Officer and the Disciplinary Board concede his actions were guided by decency and humanity, Mr. Barney supposedly violated RLD 1.1 (h). We call attention to the following language from the preamble to the Code of Professional Responsibility:

> "But in the final analysis there is the desire for respect and confidence of members of his profession and the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is *the ultimate sanction.*" (Our emphasis.)

Respectfully submitted,

HARRISON H. DEMERS*
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Federal Way, WA 98003
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1218 IBM Building
Seattle, WA 98101
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Attorneys for Petitioner

* Counsel of Record

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI AND

MOTION TO VACATE THE JUDGMENT BELOW

APPENDIX A

THE SUPREME COURT

State of Washington
Olympia

98504-0511

Reginald N. Shriver, Clerk

January 4, 1985

John J. Keough
1218 IBM Building
Seattle, WA 98101

Washington State Bar Association
Attn: Robert T. Farrell

Re: CD #6754

In Re Richard M. Barney, Jr., an attorney at Law

Dear Mr. Keough and Mr. Farrell:

The above entitled Petition for Review was considered by the Court on its January 4, 1985 Petition for Review Calendar.

The Petition was denied by Order No. 131-174 filed on January 4, 1985.

Very Truly Yours,

Reginald Schriver.

APPENDIX B

BEFORE THE DISCIPLINARY BOARD OF THE WASHINGTON STATE BAR ASSOCIATION

In re

RICHARD M. BARNEY, JR.,
An Attorney at Law.

ORDER MODIFYING AND ADOPTING HEARING OFFICER'S DECISION

On November 2, 1984, the decision of the hearing officer dismissing disciplinary proceedings regarding Richard M. Barney, Jr., entered on August 10, 1984, came before the Disciplinary Board for review, on the appeal filed by state bar counsel. Review was based on the hearing officer's decision; the Association's Statement in Opposition with attachments; Respondent Attorney's Statement in Support with attachments; the Association's Counterstatement; and oral argument before the Board conducted by attorney John J. Keough on behalf of respondent Barney and state bar counsel Robert T. Farrell. In addition, Mr. Barney personally addressed the Board. By stipulation, the transcript of the hearing was not before the Board. Based on this review,

IT IS ORDERED that the decision of the hearing officer is adopted in part and modified in part, as follows:

a. The Findings of Fact, paragraphs 1 through 16, are adopted;

b. Conclusion of Law paragraph 1 is adopted;

c. Conclusions of Law paragraphs 2 and 3 are stricken, and the following language substituted as a new Conclusion of Law:

It is the unanimous opinion of the Disciplinary Board that the Employment of a disbarred lawyer in a law office violates RLD 1.1(h), but under the circumstances the good faith belief of respondent militates against any discipline in this case.

d. Conclusion of Law paragraph 4 is adopted;

e. The Recommendation of the hearing officer, paragraphs 1 and 2, is stricken and the following language substituted:

The decision of the hearing officer dismissing this proceeding is reversed, but no sanction shall be imposed on the respondent lawyer for the reasons set forth above.

The vote on this matter was 9-0. Mr. Ferguson took no part in the deliberation or vote.

DATED this 8 day of November, 1984.

WASHINGTON STATE BAR ASSOCIATION
Disciplinary Board

By.....
Homer Crollard, Chairman

APPENDIX C

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re: RICHARD M. BARNEY, JR.,
An Attorney at Law.

ORDER DENYING PETITIONS BY RESPONDENT

Two petitions by respondent Richard M. Barney, Jr., have come before the undersigned as Chairman of the Disciplinary Board:

PETITION FOR CLARIFICATION OR, IN THE ALTERNATIVE, FOR A SPECIAL RULING and PETITION AND MEMORANDUM FOR RECONSIDERATION. Neither of said petitions is dated, but apparently they were filed with the Washington State Bar Association on November 26, 1984.

Having reviewed and considered both of said Petitions, and also reviewed the hearing officer's Findings of Fact, Conclusions of Law and Recommendation dated August 10, 1984, and also this Board's Order Modifying and Adopting Hearing Officer's Decision dated November 8, 1984, and being fully advised in the premises, the undersigned is of the opinion that both of said Petitions should be DENIED.

IT IS SO ORDERED.

DATED this 7th day of December, 1984.

WASHINGTON STATE BAR ASSOCIATION Disciplinary Board
By /s/ Homer Crollard, Chairman

ORDER DENYING PETITIONS
BY RESPONDENT

APPENDIX D

BEFORE THE DISCIPLINARY BOARD OF THE WASHINGTON STATE BAR ASSOCIATION

IN RE: Richard M. Barney, Jr.,
An Attorney at Law

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

THIS MATTER having come on regularly for hearing on July 24, 1984, before the undersigned Hearing Officer on the Formal Complaint filed by State Bar Counsel and the Answer of the Respondent; Robert T. Farrell, State Bar Counsel, appearing on behalf of the Washington State Bar Association; the Respondent appearing in person and being represented by his attorney, John J. Keough; the Hearing Officer having received the Stipulation of Facts of the parties, signed by their respective attorneys; having heard the testimony of the Respondent; having read the exhibits attached to the Stipulation of Facts and the Exhibits offered into evidence at the hearing; and the Hearing Examiner having made the following rulings at the commencement or during the hearing to-wit:

1. Respondent's objections based upon constitutional grounds should not be considered at this level.

2. The Bar Counsel's objections were sustained as to offer proof that other attorneys—and judges—have indulged in the employment of disbarred attorneys and the enforcement of RLD 1.1 (h) has been lax, that Robert Eggers' employment by attorneys and judges while he was disbarred was known to the Board of Governors of the Washington State Bar Association and the Supreme Court

of the State of Washington at the time of hi. reinstatement proceedings and that, although an attorney suspended in Oregon State worked for a Seattle attorney during the term of his suspension, his admission to practice was recommended to the Board of Governors by the Washington State Bar Counsel and said admission was recommended 8 to 1 by the Board of Governors to the Washington State Supreme Court.

3. Although the Hearing Examiner considered the absence of prosecution of other cases not a defense to the person who was charged, if in fact a violation of rule has occurred, he did permit introduction of the record which was before the Board of Governors and the State Supreme Court in the Egger's case (93 Wn2d 706).

4. On the same basis as stated in 3, the Hearing Examiner permitted testimony from a Mr. David Olwell, of Mr. Barney's firm, to the effect that whatever complaint might have been brought against him (of which he had been unaware) had been dismissed.

And the Hearing Examiner having rendered a written opinion on July 27, 1984, which is attached to these Findings, Conclusions and Recommendations and incorporated herein, he now makes and enters the following:

FINDINGS OF FACT

1. Respondent Richard M. Barney, Jr., was admitted to the practice of law by the Supreme Court of the State of Washington on September 28, 1970. At all times hereto he has practiced law in the State of Washington with his principal offices in King County, Washington.

2. Robert L. Butler was disbarred as an Attorney at Law on October 14, 1981, following a criminal felony

conviction for the theft of client funds. On August 24, 1981, Mr. Butler was placed on probation for 5 years as a result of the conviction and ordered to make restitution in the amount of $10,726.68. In fulfillment of an additional probationary requirement of providing 400 hours community service, Mr. Butler worked 400 hours for the Clerk of the King County Superior Court. He received a letter of commendation from the Clerk for his work. Mr. Barney read that letter on or before September 22, 1983.

3. On September 22, 1983, Mr. Barney, on behalf of the law firm of Barney, Weiner & Olwell and Mr. Butler entered into the Employment Agreement attached to the Stipulation of Facts.

4. During the time Mr. Butler worked for Barney, Weiner & Olwell, P.S., he was assigned office space in the Federal Way offices occupied by the law firm. Mr. Butler's initial work for the law firm related to the reconstruction of accounting records in a complex case in which Mr. Barney had been retained and was preparing to commence suit. Mr. Barney knew at the time Mr. Butler was employed that Mr. Butler had completed approximately thirty hours of accounting courses at the university level, had been employed by the Internal Revenue and Army Audit Agency and had performed accounting and auditing work for CPA firms in Seattle, Washington, while attending law school. Beginning in October, 1983, Mr. Barney, on occasions had Mr. Butler perform legal research for him in other cases. On one occasion Mr. Butler attended a meeting at which Mr. Barney and his clients were present.

5. Mr. Butler's salary (per the attached Agreement) was paid from funds deposited to the bank account of Barney, Weiner & Olwell, P.S., which funds were used to pay salaries of all the firm's attorneys, secretaries, legal assistants and a bookkeeper, rent and all other expenses incurred in the operation of the law offices.

6. At the time Mr. Butler applied for work, Mr. Barney found Mr. Butler in serious financial straits. He was unable to pay for the necessities for his dependent children and himself. Mr. Barney and Mr. Butler had been friends for approximately fifteen years and they had been law partners with another attorney during the early 1970's.

7. At the time of Mr. Butler's employment, Mr. Barney had knowledge of Mr. Butler's disbarment. At that time, Mr. Barney had knowledge of RLD 1.1 (h) and of Formal Opinion 171 relating to an attorney in good standing employing a disbarred attorney.

8. Before hiring Mr. Butler, Mr. Barney researched the issue of whether an attorney in good standing could employ a disbarred attorney to perform services that did not constitute the practice of law. In the course of his research, he read Ethical Considerations EC-5 and EC-6, *Ferris v. Snively,* 172 Wash 167, 19 P2d 942 (1933); *In Re Eggers,* 93 Wn2d 706, 611 P2d 1260 (1980); *In Re Batali,* 98 Wn2d 610, 657 P2d 775 (1983); *In Re Ressa,* 94 Wn2d 882, 621 P2d 153 (1980); *In Re Chantry,* 84 Wn2d 153, 524 P2d 909 (1974); *Florida Bar v. Thompson,* 310 So. 2d 300 (1975) and *Werner v. State Bar of California,* 265 P2d 912 (1954), and numerous other cases and materials on the issue of the employment of a suspended or

disbarred attorney. Mr. Barney was also aware that John Rosellini, a disbarred attorney, worked for his father, Albert D. Rosellini an attorney in good standing, in the family beer business, and was not aware that disciplinary action had been taken against Albert D. Rosellini by the Bar Association. Based upon his research, Mr. Barney concluded that Formal Opinion 171 did not apply to every non-practice of law situation.

9. Shortly prior to Mr. Butler's employment, Mr. Barney had entered into an attorney-client relationship with Mr. Butler to commence an action to clarify and to establish Mr. Butler's right to work for an attorney in a non-practice of law capacity, and in the event of an adverse ruling, to challenge the constitutionality of any rule, opinion, or interpretation and/or application of any rule that prohibited Mr. Butler from working and earning a living from non-practice of law employment.

10. Mr. Butler's employment by Barney, Weiner & Olwell, P.S., was terminated on December 9, 1983, by letter dated December 12, 1983 (attached to Stipulation of Facts), as a result of the Bar Association's letter to Mr. Barney, dated December 8, 1983, received December 10, 1983 (attached to Stipulation of Facts).

11. Prior to Mr. Butler's discharge on December 9, 1983, Mr. Barney had not sought any opinion of the Bar Association (either state bar counsel or the Code of Professional Responsibility Committee) as to the propriety of his employment of Mr. Butler, nor had he brought the action for which he had been hired by Mr. Butler.

12. Mr. Barney did not advise the attorneys in the firm, other than the directors, that Mr. Butler was a dis-

barred lawyer. Nor did he advise any employee that Mr. Butler was a practicing attorney. Some associate attorneys did not learn of Mr. Butler's status as a disbarred lawyer until approximately December 8, 1983.

13. Mr. Butler's work while in the employ of Mr. Barney's firm was in the nature of an accounting-trained legal assistant and was conducted at all times under the supervision of one of the attorneys of that firm. As such, Mr. Butler's work did not in itself constitute the practice of law.

14. Mr. Barney was aware of both RLD 1.1(h) and Formal Opinion 171 prior to hiring Mr. Butler, but in good faith adjudged Formal Opinion 171 to be an incorrect interpretation of the rule of a disbarred attorney and in good faith adjudged the rule not to enjoin the hiring of a disbarred attorney if he were not in any way to engage in acts which would constitute the practice of law in the course of his employment.

15. That the Respondent considered the possibility that a violation of RLD 1.1(h) might be asserted by reason of his employment of Robert L. Butler and researched the matter thoroughly before such employment does not indicate guilty knowledge of Respondent's part. Mr. Barney's action in that respect exhibited the care a competent attorney would take in approaching this type of situation.

16. In employing Mr. Butler, Mr. Barney was motivated, in part, by compassion for a friend and former partner who was then in severe economic distress.

From the foregoing Findings of Fact, the Hearing Officer makes the following:

CONCLUSIONS OF LAW

1. RLD 1.1(h) clearly prohibits any professional association by an attorney with a disbarred attorney who is in any way engaging in the practice of law or the unauthorized practice of law.

2. The instant case does not involve unauthorized practice of law by the disbarred attorney and involves only two clauses of RLD 1.1(h):

> (a) The final clause of RLD 1.1(h) which prohibits "... practicing law under any arrangement or understanding for division of fees or compensation of any kind with a suspended lawyer...."

refers, for reasons explained in the attached letter, to a sharing of fees between a practicing attorney and the disbarred attorney; and

> (b) The second clause in RLD 1.1(h) which prohibits "... maintaining an office for the practice of law in a room or office occupied or used in whole or in part by a disbarred lawyer...."

refers, for reasons explained in the attached letter, to office sharing arrangements which exist between otherwise unaffiliated attorneys but which may have the appearance of a law association or partnership to the unsophisticated layman.

3. RLD 1.1(h) does not encompass the facts in the instant case. The Respondent's employment of Robert L. Butler in a non-practice of law capacity did not violate the rule.

4. The Respondent's termination of Mr. Butler's employment on December 10, 1983, upon receipt of the

letter dated December 8, 1983, from Mr. Farrell did not constitute an admission that Respondent had violated RLD 1.1(h) for having employed Mr. Butler.

From the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer makes the following recommendations to the Board of Governors of the Washington State Bar Association:

RECOMMENDATION

1. That the Formal Complaint against Richard M. Barney, Jr., an attorney at Law be dismissed with prejudice, with the conclusion that his employment of Robert L. Butler, a disbarred attorney, in a non-practice of law capacity did not violate RLD 1.1(h).

2. In the event the legal determination supporting Recommendation is overturned, that the sanction against Richard M. Barney, Jr. be no greater than a reprimand.

DATED this 10th day of August, 1984.

/s/ Robert T. Carter
Hearing Officer

Presented by and certified a copy served on Bar Counsel
/s/ John J. Keough
Attorney for Respondent

RANDALL & DANSKIN, P.S.
Attorneys and Counselors
1500 Seafirst Financial Center
Spokane, Washington 99201-0653
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July 27, 1984

Mr. Robert T. Farrell, State Bar Counsel
Washington State Bar Association
505 Madison Street
Seattle, WA 98104

Mr. John J. Keough
Keough & Mallett
1218 IBM Building
Seattle, WA 98101

Re: In re RICHARD M. BARNEY, JR.

Gentlemen:

This letter is intended as a statement of my thoughts concerning the matters raised at the July 24 hearing. The question is whether Mr. Barney violated RLD 1.1(h) by his employment of Mr. Robert L. Butler, who is a disbarred attorney. The pertinent facts of the matter were largely developed in the Stipulation of Facts and as hearing officer I heartily appreciate the work and cooperation which all counsel expended in putting these stipulations together. They form the large part of the findings which should be made for the benefit of the Board of Governors. Beyond the stipulated facts, I would make certain further findings as follows:

1. Mr. Butler's work while in the employ of Mr. Barney's firm was in the nature of an accounting-trained legal assistant and was conducted at all times under the supervision of one of the attor-

neys of that firm. As such, Mr. Butler's work did not in itself constitute the practice of law.

Messrs. Farrell and Keough
July 27, 1984
Page 2

2. Mr. Barney was aware of both RLD 1.1(h) and Formal Opinion 171 prior to hiring Mr. Butler, but in good faith adjudged Formal Opinion 171 to be an incorrect interpretation of the rule and in good faith adjudged the rule not to enjoin the hiring of a disbarred attorney if he were not in any way to engage in acts which would constitute the practice of law in the course of his employment.

3. In employing Mr. Butler, Mr. Barney was motivated in part by compassion for a friend and former partner who was then in severe economic distress.

Good faith in itself is not a defense, although it may influence the extent of sanctions appropriate if a violation of the rule has occurred. This matter seems to come down to an issue of interpretation of the rule. Although this rule seems to have been in effect for at least 60 years—either as a statute or a rule—I am not cited to any Washington case precedent on its interpretation. Neither am I given any indication that decisions from other jurisdictions actually address themselves to a substantially similar rule.

Formal Opinion 171 certainly addresses itself directly to this type of situation. Perhaps it compromises its conclusion somewhat by its language that an attorney in such

a case "could" be subject to discipline. Taken by its four corners, however, the Formal Opinion seems to say that what Mr. Barney did in this case would be considered a violation of the rule. The Formal Opinion, however, is conceded not to be a rule in itself or a binding interpretation of the rule, and the Supreme Court's approval of the Formal Opinion was not entered on the basis of any adversary process.

The Supreme Court does seem to be sending a conflicting signal in the *Chantry, Egger,* and *Krogh* opinions, to the extent that work by disbarred attorneys for other attorneys or for the courts or other organs of the system of justice are to be weighed in favor of such attorneys' reinstatement. Again, as indicated, these reinstatement cases may not have been fully adversary in nature. What I do apprehend is that the Supreme Court has not directly faced the issue of this type of conduct in the context of the rule invoked in this matter. The legislative history of the rule seems to send conflicting signals. It was apparently reenacted subsequent to the publication of Formal Opinion 171. However, a proposed rule which would have made it clearly applicable to a case like this has not to date been accepted. My first working conclusion is that we must interpret RLD 1.1(h) ourselves.

To start with, RLD 1.1(h) clearly prohibits any professional association with any disbarred attorney who is in any way engaging in the practice of law, whether or not such association can be said to aid the unauthorized practice of law. The present case, however, involves no unauthorized practice by the disbarred attorney. At this point the rule is less clear. In fact, it becomes confusing at some points.

RLD 1.1(h) consists of several separate clauses, any one of which can describe a violation. Only two are argued by bar counsel as applying to this case. The final clause, which prohibits

> . . . practicing law under any arrangement or understanding for division of fees or compensation of any kind with a disbarred or suspended lawyer . . .

is quite unclear in its intent. Does it speak solely to dividing "fees or compensation of any kind" with a disbarred attorney? Or does it really prohibit "any arrangement . . . for compensation . . . with a disbarred . . . lawyer"? The use of the term "with", without using the word "to", leads to the conclusion that this clause speaks strictly to the sharing of fees between the practising and disbarred attorneys. It does not seem to enjoin compensating the disbarred attorney for services which do not involve his practising law.

Bar counsel also asserts a violation of the second clause of the rule, in

> . . . maintaining an office for the practice of law in a room or office occupied or used in whole or in part by a disbarred or suspended lawyer . . .

One's first reaction to this clause is that it speaks more of joining with the established work place of a disbarred attorney than in bringing him into one's own established practice location. The latter situation seems to be more closely impacted by the first or final clauses of the rule. It may well be that under this second clause the mere propinquity in a suite of offices would be enough to constitute a violation. One need not speculate on this in the present case, however, since Mr. Butler's use of one of

Mr. Barney's offices was quite intentional on the part of both. My interpretation of this second clause of the rule is that it is simply an extension of the first clause. In other words, not only are we prohibited from practicing law in partnership with a disbarred attorney but we are further prohibited from doing so under the looser office-sharing arrangements which exist between otherwise unaffiliated attorneys but which may have the appearance of a law partnership to the unsophisticated layman. This somewhat strict interpretation of this second clause of the rule is encouraged by the fact that matters of compensation to or from a disbarred attorney are more directly addressed in the final clause of the rule which I have discussed above.

At this point I have concluded that RLD 1.1(h) as written does not encompass the case before us, and that Mr. Barney's employment of Mr. Butler in a non-practice-of-law situation did not violate this rule.

Perhaps a cogent argument to the contrary might be adopted. However, the fact that Mr. Barney considered the possibility that a violation might be asserted as to his employment of Mr. Butler, and researched the matter thoroughly before doing so, does not indicate guilty knowledge on his part. It only indicates to me the care that a competent attorney would take in approaching a situation like this one.

At the hearing I upheld bar counsel's objections as to offered proof that other attorneys—and judges—have indulged in similar employment of disbarred attorneys and that enforcement of this rule in this situation has been lax. I did permit counsel to introduce the record from

Mr. Robert Eggers' reinstatement hearing, in which some letters showed that he had worked in law offices and courts during his disbarred status. I also permitted testimony from Mr. Olwell of Mr. Barney's firm to the effect that whatever complaint might have been brought against him (of which he had been unaware) had been dismissed. My feeling is that the absence of prosecution of other cases is not a defense to the person who is charged, if in fact a violation of the rule has occurred. All of these matters, whether rejected or accepted by me at the hearing, I would judge to be extraneous to the issue of interpretation that is raised in this case, and I have not considered any of these matters in reaching the conclusions I have stated in this letter.

In light of the conclusions stated herein, I would request Mr. Keough to prepare and furnish to me proposed findings, conclusions, and recommendations to the Board of Governors consistent with the thoughts expressed in this letter. I am supposed to do this within 20 days after the July 24 hearing, and would request that Mr. Keough's work product be furnished to me in time that I may comply with this rule.

Yours very truly,

/s/ Robert T. Carter

C:reb(C/2)
cc: Mr. Richard M. Barney, Jr.
19743 First Avenue South
Seattle, WA 98148